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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCEL CATO,

Defendant and Appellant.

A155276

(Contra Costa County  
Super. Ct. No. 04-191981-0)

Defendant Marcel Cato pleaded no contest to second degree burglary and was placed on probation. He appeals from a postjudgment order requiring him to pay restitution to the victim, claiming that the trial court abused its discretion in setting the amount of restitution. Cato entered a broad waiver of his right to appeal as part of the plea, however, and he failed to obtain a certificate of probable cause. Therefore, the appeal must be dismissed under this division's decision in *People v. Espinoza* (2018) 22 Cal.App.5th 794 (*Espinoza*).

I.  
FACTUAL AND PROCEDURAL  
BACKGROUND

In December 2017, Cato was charged with a felony count of first degree burglary based on an incident that occurred the previous month. The complaint was later amended to add a felony count of second degree burglary, to which Cato pleaded no contest, and

the other burglary count was dismissed.<sup>1</sup> The trial court suspended imposition of the sentence and placed him on three years of formal probation, with a condition that he serve 120 days in jail.

On his plea form, Cato initialed the following statement: “I understand that I have the right to appeal this sentence, conviction and any rulings made by the Court in this case. I give up my right to appeal in exchange for accepting this negotiated disposition.” He also initialed a statement indicating he understood that he would be required “to pay appropriate restitution to the victim(s) of [his] crimes and/or pay a restitution fine of not less than \$200 and not more than \$10,000.” Finally, he also initialed statements indicating that his “mental abilities [were] not now impaired,” he was “fully able to understand these proceedings,” and he “freely and voluntarily” pleaded no contest to the charge.

Before Cato entered his plea, the trial court confirmed that he understood the plea form and had initialed and signed it himself. The court accepted the plea and found it “to be made knowingly, intelligently and freely with full knowledge of [his] rights and [his] consequences.” The court immediately proceeded to sentencing, during which it noted, “Victim restitution will be reserved, and if there was any damage owed, then I’ll ask that you pay that amount.”

Several months later, in August 2018, a restitution hearing was held. Over Cato’s objection that the claim statement submitted by the victim was insufficient to support the amount of restitution sought, the trial court ordered Cato to pay \$3,416.94 in victim restitution. He filed a notice of appeal indicating that the appeal was “based on the sentence or other matters occurring after the plea that do not affect the validity of the plea,” and he did not seek a certificate of probable cause.

Notwithstanding his indication in the notice of appeal that he was not appealing a matter affecting the validity of the plea, Cato later applied to this court for permission to

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<sup>1</sup> The original burglary charge was under Penal Code section 459, and Cato pleaded no contest to second degree burglary under Penal Code sections 459 and 460, subdivision (b). All further statutory references are to the Penal Code.

file a late request for a certificate of probable cause in the trial court. Specifically, he sought to request a certificate to permit him to challenge on appeal the amount of victim restitution ordered. This court denied the application, Cato petitioned for review of the ruling, and the Supreme Court denied the petition in April 2019.

## II. DISCUSSION

In seeking permission to file a late request for a certificate of probable cause, Cato recognized that, in light of the appellate waiver in his plea, he needed a certificate to raise the restitution issue before this court. He now argues that such a certificate was not required after all because in entering his plea he did not knowingly and intelligently waive his right to appeal the specific amount of victim restitution ordered. The argument fails under *Espinoza*.

“Under section 1237.5, a defendant cannot appeal after entering a plea of no contest unless he or she ‘has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings’ and the trial court ‘has executed and filed a certificate of probable cause for such appeal with the clerk of the court.’ ‘ “The purpose of section 1237.5 is . . . ‘to discourage and weed out frivolous or vexatious appeals challenging convictions following guilty and nolo contendere pleas,’ and . . . [t]he requirements of [the statute] . . . must be strictly applied.” ’ ” (*Espinoza, supra*, 22 Cal.App.5th at pp. 798-799.)

“California Rules of Court, rule 8.304 establishes an exception to section 1237.5. A defendant who has entered a plea of no contest need not obtain a certificate of probable cause ‘if the notice of appeal states that the appeal is based on: [¶] (A) The denial of a motion to suppress evidence under . . . section 1538.5; or [¶] (B) Grounds that arose after entry of the plea [that] do not affect the plea’s validity.’ [Citations.] If a notice of appeal identifies either of these circumstances as the basis for the appeal, ‘the reviewing court will not consider any issue affecting the validity of the plea’ unless the defendant obtains a certificate of probable cause.” (*Espinoza, supra*, 22 Cal.App.5th at p. 799.)

Although Cato’s notice of appeal states the appeal is based on grounds that do not affect the plea’s validity, that statement is not determinative. As our state Supreme Court has explained, “ ‘the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5.’ ” (*People v. Buttram* (2003) 30 Cal.4th 773, 781-782.) In *Espinoza*, we held that “a defendant who waives the right to appeal as part of a plea agreement must obtain a certificate of probable cause to appeal on any ground covered by the waiver, regardless of whether the claim arose before or after the entry of the plea.” (*Espinoza, supra*, 22 Cal.App.5th at p. 797.) This is because to raise a claim covered by an appellate waiver, a defendant must first successfully challenge the waiver’s validity, and an attack on such a waiver’s validity is in substance a challenge to the validity of the plea. (*Id.* at p. 800.)

Here, Cato gave up his “right to appeal . . . *any rulings made by the Court in this case*,” and at the time he gave up this right he indicated on the plea form that he was aware the trial court might enter an order of victim restitution. (*Italics added.*) Thus, by its express terms, the waiver encompassed his right to appeal the restitution order. We agree with Cato “that, as a general principle, defendants cannot knowingly and intelligently waive the right to appeal an issue that was not contemplated at the time of the waiver.” (*Espinoza, supra*, 22 Cal.App.5th at p. 801.) But the imposition of restitution here was contemplated at the time of the waiver, even if the specific amount was not, and his challenge therefore falls within the scope of his appellate waiver, which covers all the trial court’s rulings. (*Id.* at p. 802 [“Where a defendant broadly waives the right to appeal as part of a plea, he or she must obtain a certificate of probable cause to appeal on *any* ground covered by the waiver, not just grounds that were apparent before entry of the plea”].) *Espinoza* held that without a certificate of probable cause the reviewing court could not consider the defendant’s appellate challenge to a particular probation condition since the defendant waived his right to appeal and understood at the time of his plea that probation conditions might be imposed. (*Ibid.*) We see no way to meaningfully distinguish those circumstances from the situation here in which Cato seeks

to challenge a particular amount of restitution even though he waived his right to appeal and understood at the time of his plea that restitution might be imposed. Therefore, even assuming Cato is correct that he did not knowingly and intelligently waive his right to appeal the restitution amount, a certificate of probable cause was still required to raise the claim, because it in effect challenges the validity of the plea. (See *id.* at pp. 802-803.)

### III. DISPOSITION

The appeal is dismissed.

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Humes, P.J.

WE CONCUR:

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Margulies, J.

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Sanchez, J.

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